

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: **January 25, 2001**

Case No.: **2000-INA-140**

CO No.: **P1999-CT-01278267**

In the Matter of:

JANE & MICHAEL PEAK

Employer,

on behalf of:

HELEN R. GROSPE

Alien.

Appearance: Cynthia R. Exner, Esq.
for Employer and Alien

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Before: Burke, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arises from an application for labor certification¹ filed by Jane and Michael Peak ("Employer") for the position of Household Cook on behalf of Helen R. Grospe ("the Alien"). (AF 56-57).² The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any

¹ Alien Labor certification is governed by Section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(a) and 20 C.F.R. Part 656. Unless otherwise stated, all references are to 20 C.F.R.

²"AF" is an abbreviation for "Appeal File."

written argument of the parties. § 656.27(c).

STATEMENT OF THE CASE

On November 13, 1997, Employer filed an application for alien employment certification on behalf of the Alien to fill the position of Domestic Cook. (AF 56-59). The job to be performed was described as follows:

[R]esponsible for planning menus and cooking meals in private home for family members according to recipes or tastes of employer[.] Peels, washes, trims and prepares vegetables and meals for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. Serves meals and prepares fancy dishes and pastries. Does groceries for breakfasts, lunches and dinners.

(AF 56). Total hours of employment were listed as 40 hours per week, from 12:30 to 8:30 p.m. Minimum requirements for the position were listed as two years experience in the job offered or in any job environment requiring cooking. *Id.* Employer received two applicant referrals in response to their recruitment efforts. One was rejected as uninterested in the position because it was in a private home, and the other did not contact Employer. (AF 25).

A Notice of Findings (“NOF”) was issued by the CO on June 16, 1999, citing § 656.20(c)(8) and questioning the existence of a *bona fide* job opportunity open to any U.S. worker. (AF 16-18). The CO noted that under immigration law, the number of immigrant visas available to “unskilled workers” is very limited, whereas, there is no current waiting period for most immigrant visas in the “skilled workers” category. Because the occupation of Domestic Cook requires two years of experience, it is considered a skilled position. Employer was instructed to explain why the position should be considered a *bona fide* opportunity for a Domestic Cook as opposed to one created solely for the purpose of qualifying the Alien as a skilled worker under current immigration law. Rebuttal evidence, at a minimum, was to include responses to twelve enumerated questions including documentation where appropriate, specifically, where did the Alien acquire her training and what is the nature of the relationship between the Alien and Employer. (AF 17).

In Rebuttal submitted on July 19, 1999, Employer responded to each of the twelve questions. (AF 8-15). Employer stated that the Alien would prepare at least two meals a day for their family of four, and would often prepare extra meals to be served on her off days or for entertaining. Employer stated that they often have guests staying for extended periods of time, entertain at least 3 to 4 times a month and have several large parties a year, all for which the Cook is responsible for food preparation and presentation. Employer indicated that Mr. Peak works outside the home from 8:00 a.m. until 4:00 p.m. Mrs. Peak maintains a small business and has numerous volunteer commitments, but is home to take the children to after school activities. Employer identified three neighborhood babysitters who help

with childcare, and further stated that a housekeeper and a gardener are employed on a part-time basis. Employer stated that the Alien was hired in 1992 while the family lived in Singapore, and that she returned to the United States with them at the end of 1992 after they procured her a visa. Employer states that while in Singapore the Alien did the cooking, cleaning and the childcare for the family, but once they returned to the U.S. her duties changed and she is now a full-time cook. Further, the only documentation submitted as to her experience was an assertion that:

Over the years, [the Alien] has learned to cook all the family favorites and often cooks her native specialties like chicken Adoboe, chicken curry and Pork Vindaloo. For parties, she prepares everything from appetizers to desserts.

(AF 10).

A Final Determination ("FD") denying labor certification was issued by the CO on July 27, 1999, based upon a finding that Employer had failed to adequately document that there is a *bona fide* position for a Domestic Cook in their household. (AF 5-7). The CO noted that "[i]ndependent documentation to verify the alien's training or employment experience as a cook has not been provided" and that "[a] special relationship exists between the employer and the alien through long association close enough to sponsor the alien to accompany the family upon return from overseas." These facts, along with the CO's finding that the Alien was more likely to be employed as a general houseworker due to the limited amount of additional household workers, led to the determination that no *bona fide* position exists. (AF 6-7).

Employer filed a Request for Review on August 18, 1999. (AF 1A-4). The matter was docketed in this Office on March 9, 2000, and Employer filed a Statement of Position on March 22, 2000.

DISCUSSION

Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. This regulation means that the job opportunity must be *bona fide*, and that the job opening as described on Form ETA 750, actually exists and is open to U.S. workers. The burden of proof for obtaining labor certification is on the employer who seeks an alien's entry for permanent employment. § 656.2(b).

In denying labor certification, the CO concluded that the details provided on rebuttal did not establish that there was a *bona fide* position for a Domestic Cook, but, rather, showed that it was more likely that the Alien will be employed as a General Houseworker. We concur. In *Carlos Uy III*, 1997-INA-304 (Mar. 3 1999)(*en banc*), the Board set forth a "totality of circumstances" test to be used in order to determine the *bona fides* of a job opportunity in domestic cook applications. As stated by the Board in *Uy*:

The heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position. In applying the totality of the circumstances test, the CO's focus should be on such factors as whether the employer has a motive to misdescribe the position; what reasons are present for believing or doubting the employer's veracity for the accuracy of the employer's assertions; and whether the employer's statements are supported by independent verification.

Id.

The burden of proving that the employer is offering a *bona fide* job opportunity is on the employer. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988)(*en banc*). As was noted by the Board in *Uy*, "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Id.* at 8. Further, it is well settled that a bare assertion without either supporting reasoning or documentation is generally insufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *Uy*, at 9.

In the instant case, the CO found Employer's rebuttal documentation, which consisted of nothing more than a two-page letter and a copy of Employer's 1998 tax return, insufficient to establish that there is a *bona fide* position for a Domestic Cook in Employer's household. Reviewing the facts under the totality of circumstances test demonstrates that the CO reached the correct conclusion. Specifically, there is a special relationship between Employer and the Alien, so much so that Employer sponsored the Alien to accompany the family upon returning from overseas. Employer stated that the Alien did the cooking, cleaning and childcare for them while overseas, but that now she would be a full-time cook. However, Employer offered conflicting statements and failed to adequately explain why the Alien is no longer performing these other duties, or who actually does perform these duties.³ Employer also provided no documentation regarding an entertainment schedule or the Alien's experience prior to working for Employer. Employer states that the Alien is currently employed with Employer in the position for \$300 per month for forty hours a week (AF 41), yet the application indicates that the position will be paid \$300 per week. (AF 42, 57). These facts all indicate a strong motive to misdescribe the position and provide a basis for doubting the veracity of employer's assertions.

Further, the record is wholly absent of verification for Employer's assertions. The CO was justified in drawing an adverse inference from such a lack of willingness to produce supporting documentation that would support the employer's case. *See Uy, supra*. On this basis, we conclude

³In a January 15, 1999 letter, Employer states that they employ a housekeeper and a babysitter on a once a week basis. (AF 42). In their rebuttal letter, Employer states that they employ a housekeeper from 8:00 to 4:00 two days a week. (AF 9). Further, Employer identified three neighborhood babysitters they use, but chose not to identify the person who allegedly now cleans the home.

that labor certification was properly denied. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

